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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

AMANDA TOTTEN,

Plaintiff,

v.

EVERGREEN PROFESSIONAL  
RECOVERIES, INC., a Washington  
Corporation,

Defendant.

No. 2:14-cv-015 RMP

DECLARATION OF  
ANDREW D. SHAFER

NOTE FOR CONSIDERATION:  
**SEPTEMBER 22, 2014**

I, Andrew D. Shafer, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney licensed to practice law in Washington State. I have been in practice since 1979. I am admitted to practice before this court, the Western District of Washington and the Northern District of Illinois.

2. Evergreen attempted to resolve this matter within 45 days of service of the summons and complaint. Because the complaint contained the usual pro forma prayer for "actual damages" (even though such damages rarely

SHAFER DECLARATION IN SUPPORT  
OF DEFENDANT'S MOTION FOR  
SANCTIONS - 1  
[2:14-CV-015-RMP]

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1 exist in these cases), Evergreen made a formal Offer of Judgment under  
2 Fed.R.Civ.P 68 on March 5, 2014. A copy of the offer is attached as Exhibit 1.

3 3. I transmitted the Offer of Judgment to Mr. Miller via email. I chose  
4 email for several reasons. Foremost, this is not my first case with Mr. Miller. In  
5 every other instance, we used email extensively. Attached as Exhibit 2 is an  
6 email exchange between us in an unrelated case in which Mr. Miller agreed to  
7 delivery by email.

8 4. By sending the Offer by email, I hoped to expedite resolution of the  
9 case. Exhibit 3 is the email string between me and Mr. Miller on March 5,  
10 beginning with my tender of the Offer of Judgment and ending with his cryptic  
11 advise that the offer was not valid due to unarticulated "multiple problems." I  
12 spoke with Mr. Miller after receiving his 6:42 p.m. transmission in an attempt to  
13 understand the "multiple problems." My call was unavailing.

14 5. On March 14, I again sent Mr. Miller an email asking whether his  
15 client desired to resolve the case based on the Offer of Judgment. I even offered  
16 to mail the offer to him if he insisted on relying on this unnecessary and  
17 vexatious requirement.

18 6. Not eight minutes after I sent my March 14 email, Mr. Miller  
19 responded feigning, "confusion." Exhibit 4 is the March 14 email exchange.

20 7. Ten days later, EPR increased its offer to \$2500 in response to  
21 Plaintiff's \$3500 demand. That was the point at which meaningful settlement  
22 efforts ended, resulting in the cross motions. Plaintiff did not respond with a  
23

1 counter offer at that time. Nor did Mr. Miller pick up the telephone to attempt to  
2 resolve the claim.

3 8. Instead, we received a demand for \$3500, which Mr. Miller  
4 extended in an email dated May 30, attached as Exhibit 5. However, when I  
5 asked for proof to justify his fee request, Mr. Miller declined. Instead, he simply  
6 advised me that he had prepared a motion for summary judgment, which was  
7 "just about ready to go." At this point, it was obvious all we were discussing  
8 was Mr. Miller's fees, which no doubt inflated with his work on his motion for  
9 summary judgment. At the end of the day, I was playing cat and mouse with  
10 Mr. Miller over a minor claim that should have resolved with a phone call or  
11 two. Note, on March 25, Mr. Miller was already contemplating plaintiff's  
12 motion for summary judgment.

13 9. The parties did not engage in any further settlement discussions  
14 until May 30, when I again asked if Plaintiff would settle and was met with  
15 Exhibit 5.

16 10. I maintain an active commercial litigation practice. In 2003, I  
17 began representing collection agencies in defense of FDCPA and related  
18 consumer claims in 2003.

19 11. I am an active member of ACA International, a trade association of  
20 collection professionals. I am currently on the ACA Council of Delegates as a  
21 representative of the Member Attorney Panel of the association.

1 12. I am also a member of ACA's CNR Panel. This panel is  
2 comprised of defense and risk management attorneys, such as myself, who are  
3 certified by St. Paul insurance to review collection notices used by industry  
4 members. When this panel was originally created, St. Paul would not extend  
5 industry E&O coverage to notices unless the notices were first reviewed by  
6 CNR members. While that requirement was ended in 2010, the CNR Panel is  
7 still widely used by the industry to manage the risks arising from written  
8 communications with consumers.

9 13. My current hourly rate for commercial litigation ranges from a low  
10 of \$325 to \$450, depending on the complexity of the facts, novelty of legal  
11 issues and the immediacy of a matter (such as injunction actions which require  
12 "code red" treatment). I also discount my hourly rate for well-established  
13 clients for whom I provide services in addition to litigation. Generally, I defend  
14 collection agencies at my low rate of \$325 because these cases, as a rule, are  
15 neither novel nor complex and generally do not involve any time critical actions.

16 14. I have represented Evergreen Professional Recoveries for  
17 approximately two years, representing the company in FDCPA (and related)  
18 defense matters. I initially billed this client \$275/hour and have not changed my  
19 rate. I have billed Evergreen \$275/hour for this matter.

20 15. Attached as Exhibits 6-10 are my invoices to Evergreen on this  
21 matter. My billing cycle runs from the 16<sup>th</sup> of the month through the 15<sup>th</sup> of the  
22  
23

1 following month. As such, my March 16 invoice includes all of my time before  
 2 Mr. Miller began his cat and mouse game. The invoices are as follows:

INVOICE DATE	INVOICE NUMBER	TIME BILLED/FEE	COSTS BILLED
2/17/14	11910	5.40hr/ \$1,347.50	0.00
3/16/14	11936	4.30/ \$770.00	0.00
4/16/14	NONE		
5/16/14	NONE		
6/16/14	12035	11.30/ \$3,007.50	0.00
7/16/14	12053	6.30/ \$1,470.00	138.00
8/18/14	12081	12.50/ \$3,275.00	370.00
TOTALS:		39.80/ \$9,870.00	508.00
POST 3/14/14 TOTALS:		30.10/ \$7,782.50	508.00

11 16. In my opinion, this case should have settled around March 5, when  
 12 EPR made an offer for 125% of the *maximum award* Plaintiff could have  
 13 received at trial unless she could have proven actual damages.

15 17. Evidence of actual damages is uniquely in the plaintiff's hands. In  
 16 this case, while the plaintiff's prayer for relief sought actual damages, the  
 17 plaintiff's motion for summary judgment was silent. All plaintiff sought was  
 18 the statutory damages plus costs and fees.<sup>1</sup> Since Mr. Miller had to know, or in  
 19 the exercise of his Fed.R.Civ.P 11 obligations, should have known, that he had

21  
 22 <sup>1</sup> Note, the plaintiff's motion was for summary judgment, not a partial summary judgment on the liability issue  
 23 with damages reserved for trial. Necessarily, Plaintiff abandoned any claim for actual damages because she  
 neither presented evidence of the same nor did she seek only a partial summary judgment on liability, as is  
 permitted by Fed.R.Civ.P 56

1 no facts to support the claim for actual damages, he likewise should have  
2 known that EPR's \$1250 offer, regardless of how packaged and regardless of  
3 the mechanism of how it was delivered, exceeded by 25% the ceiling of any  
4 award he could have hoped to recover. His cat and mouse game lays bare his  
5 objective here – to ratchet up his fees by pushing the case to summary  
6 judgment, even though his tactic put his client's interests at risk.  
7

8 Executed at Seattle, Washington this 22<sup>nd</sup> day of August 2014.  
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11 ANDREW D. SHAFER  
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